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GRSADO001

LLM: INTERNATIONAL TRADE LAW

TOPIC: ATTAINING UNIFORMITY IN THE MEANING AND APPLICATION OF GOOD FAITH IN INTERNATIONAL TRADE INSTRUMENTS

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM International Law in approved courses and minor dissertation. The other part of the requirement for this qualification was the completion of a program of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM International Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the UCT referencing style for citation and referencing. Each contribution to, and quotation in, this dissertation from the work(s) of other people has been attributed, and has been cited and referenced.
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Adolf Nana Gariseb

DEDICATION

To my beautiful and loving parents Titus and Nathalia, and to my sisters Petronella and Merlin. Thank you for your continued support and encouragement. I thank God for you.

I would like to express my sincere gratitude to Associate Professor Bradfield, you were the most patient and helpful supervisor. Thank you for the time, guidance, support and most of all, the indispensible knowledge. I could not have imagined having a better mentor to guide me through this.

CHAPTER 1 INTRODUCTION

I Aim of dissertation

The concept of good faith has been in existence for a long period of time.[1] It has been used over the years to describe both the contractual relationship that the parties should aspire to have and the manner in which the contract must be executed.[2] A number of legal systems, however, consider good faith to apply to the law of obligations generally, and that it is not limited to contract law.[3] Despite having this important role, finding a precise definition of good faith has been a formidable task.[4] This is largely because of its elusive nature, which has led to differences in what it is understood to mean and in approaches to its application both in national contract laws and international trade instruments.[5]

An international trade instruments that does not define good faith presents courts and tribunals with the difficulty of 'gap-filling' with reference to national laws with which they are most familiar or with which the parties have the closest connection.[6] The underlying premise for this practice is argued to be that:

> 'In our world of positive transaction costs and bounded rationality, parties cannot write complete contracts specifying a suitable provision for every possible state of the world.'[7]

However despite this rationale, gap-filling can undermine uniformity in the meaning and application of good faith in international trade instruments.[8] Furthermore the application of good faith in international trade instruments is also subject to a degree of uncertainty.[9] This can lead to an element at least of gap-filling with reference to national laws, in which there are different

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[1] Paul J. Powers 'Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods' (1999) 18 *JLC* 333 at 335.
[2] Ibid at 336.
[3] Bénédicte Fauvarque-Cosson et al *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Mode Rules* (2008) 151.
[4] Powers op cit note 1 at 333.
[5] Andrew Terry & Cary Di Lernia 'Franchising and the quest for the Holy Grail: Good faith or Good intentions?' (2009) 33 *MULR* 542 at 556.
[6] Mariana Pargendler 'Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered' (2007-2008) 82 *TLR* 1315 at 1318.
[7] Ibid.
[8] John Felemegas *An International Approach to the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 9.
[9] Powers op cit note 333-334.

approaches to the application of good faith.[10] This can again undermine the objective of uniformity.[11]

The objective of this dissertation is to ascertain whether it is possible to have a universally acceptable meaning of good faith and if indeed such a meaning can finally lead to uniformity in the application of the concept in international commercial transactions. It will be argued that such uniformity is possible but that it cannot be achieved without addressing the obstacles that have prevented a uniform adoption of the concept to date and how such difficulties can be solved in international trade.

In answering the above question the dissertation will look into the meaning and application of the concept of good faith within international trade instruments, primarily article 7(1) and (2) of the Convention on the International Sale of Goods (CISG);[12] article 1.7 of the UNIDROIT Principles on International Commercial Contracts,[13] and the Principles of European Contract Law (PECL).[14] The purpose of considering these instruments is to identify the current difficulties in the meaning and application of good faith in international commercial transactions and how they can be addressed if uniformity is to be attained.

Furthermore the dissertation will also examine the different definitions of good faith and the methods of application adopted by major European legal systems, particularly the German civil code,[15] the Dutch civil code,[16] the Uniform Commercial Code[17] and the position in English law. The purpose for considering these domestic legislations is to identify the possible meaning and application that will be given to good faith in situations where courts and tribunals gap fill with reference to national laws.

II Historical background

Understanding the concept of good faith demands an understanding of its historical development. An obligation of good faith in commercial transactions was required as early as the Roman times.[18] Its fundamental origin can be traced back to Christian norms of ethics and good behavior

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[10] Ibid.
[11] Ibid at 9.
[12] The United Nations Convention on the International Sale of Goods (CISG), 1980.
[13] The UNIDROIT Principles on International Commercial Contracts, 2010.
[14] Principles of European Contract Law (PECL), 1998.
[15] Germany Civil Code of January 1, 1900.
[16] Dutch Civil Code of October 1, 1838.
[17] The United States Uniform Commercial Code, first published in 1952.
[18] Powers op cit note 1 at 335.

that require one to act in accordance with generally acceptable principles of good conduct.[19] It is argued that the introduction of good faith into Roman law had been influenced by Greek writers such as Aristotle and Thomas Aquinas.[20] A demonstration of the prominent position that good faith held in Roman contract law is in the contract of sale, where it led to the reception of the aedilitian remedies into the *jus civile* which in turn led to the amelioration of the harsh *caveat emptor* principle.[21] In a broader sense, it is said that *bona fides*, as good faith was known during the Roman times, allowed the judge to consider error and duress in determining if either *actio empti* or *venditi* could be granted.[22] In addition, the judge was able to consider a counterclaim arising from the same transaction and to condemn the defended only in the differences between the two claims.[23] The obligation of contracting in good faith resurfaced in the period of the law merchant during the eleventh and twelfth centuries.[24]

In the present day, the idea of performing a contract in good faith has been adopted in most jurisdictions, however the scope and application of the concept has differed depending on the legal system that governs the commercial transaction.[25] The extent of the application of good faith is wider in civil law states where it is applied to both contract formation and performance; in contrast most common law states tend to adopt a narrow and focused good faith duty that is applicable only to the performance of the contract.[26]

III Structure of the dissertation

Chapter 2 examines the concept of good faith in international trade; this will be done by looking at its meaning as defined by scholars and other sources. These attempts at defining good faith will be examined in order to identify the problems relating to the meaning, context and role of the concept. This serve as a benchmark to answering the question discussed in this dissertation.

Chapter three identifies the role of good faith in international trade instruments. This chapter will primarily focus on the contentious good faith provision in articles 7 (1) and (2) of the CISG and the good faith provisions in other international trade instruments such as the

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[19] Ibid at 334.
[20] John Eatwell & Murray Milgate et al *The New Palgrave: a dictionary of economics* (1987) 422.
[21] Reinhard Zimmermann *Good Faith in European Contract Law* (2000) 17.
[22] Ibid.
[23] Ibid.
[24] Powers op cit note 1 at 334.
[25] Ibid.
[26] Ibid at 335.

UNIDROIT Principles including a discussion on the PECL. The purpose of this chapter is to identify the current difficulties in the meaning and application of good faith within these instruments and how they can be addressed if uniformity is to be attained.

Chapter four examines the concept of good faith as adopted in major national systems of law that include the German Civil Code, Dutch Civil Code, the US Uniform Commercial Code and English contract law. The purpose of this chapter is to identify the approaches that have been adopted by these domestic legislations which can perhaps be used in international trade instruments to bring harmony in the meaning and application of good faith.

Chapter five will conclude that uniformity in the meaning and application of the good faith concept is possible. Furthermore, this chapter will identify the possible difficulties associated with the attainment of this objective drawn from the discussed international trade instruments and national laws and thereafter provide recommendations to address them.

CHAPTER 2 THE CONCEPT OF GOOD FAITH IN INTERNATIONAL TRADE

I The meaning of good faith

There have been several attempts made over the years by scholars and commentators to find a comprehensive meaning of good faith.[27] A precise definition is, however, still not clear and the term is often described as 'too vague and undefinable.'[28] Despite this difficulty most definitions seem to capture the general essence of what good faith encompasses; for instance, in defining good faith, Vico used the definition given by the *Black's Legal Dictionary* which provides that good faith is:

> '…an intangible and abstract quality with no technical meaning or statutory definition and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.'[29]

This definition continues to provide that in common usage good faith is:

> '…ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.'[30]

Furthermore, the notion that good faith lacks meaning was also expressed by Neumann who argued that:

> 'The character of good faith is tied standards of morality, which are likely to change over time and which are different depending on whom holds the interest and which may be impossible to or ill-suited to being controlled by law.'[31]

It can be argued from this definition that perhaps an unstable concept such as good faith does not have a place in international trade instruments which require ascertainable rules for the parties in international commercial transactions.

In finding relevance for good faith in international commercial transactions, Powers defined the concept as:

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[27] Powers op cit note 1 at 350-351.
[28] Mary Keyes & Therese Wilson *Codifying contract law: international and consumer law perspectives* (2014) 64.
[29] Giambattista di Vico *Universal Right* (2000) 216.
[30] Ibid.
[31] Thomas Neumann *The Duty to Cooperate in International Sales: the Scope and Role of Article 80 CISG* (2012) 134.

> '…an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act.'[32]

Such acts of the contractual parties that are to be construed as reasonable perhaps depend on the circumstances of each commercial transaction. Similarly O'Connor expressed the significance of good faith in international law by stating that the concept of good faith is:

> '…a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in international community at that time.'[33]

These definitions indicate the significant role that good faith can have in a multinational setting despite its ambiguity.

Furthermore, many scholars have argued that the most complete inclusive and earliest definition of good faith was possibly left by CICERO when he stated that:

> 'These words, good faith, have a very broad meaning. They express all the honest sentiments of a good conscience, without requiring scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance.'[34]

It is noteworthy that all the above attempts at defining good faith convey a common idea of fairness, faithfulness and acting in a just manner that is expected from a reasonable contractual party. However, Pelletini argues, similar to Neumann, that despite the similarities in the definitions of good faith, any possible definition is subjective and reflects a specific origin, history and function of the concept in different jurisdictions and international trade instruments.[35]

It may be argued based on the above that finding a definition of good faith is a formidable task therefore some scholars share the opinion that it is not possible to give the concept a definition.[36] It is therefore argued that a better exercise would be to rather understand

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[32] Powers op cit note 1 at 352.
[33] John O'Connor *Good Faith in International Law* (1991) 124.
[34] Fauvarque-Cosson op cit note 1 at 152.
[35] Cristiano Pettinelli 'Good Faith in contract law: Two paths, two systems, the need for harmonization' available at *http://www.diritto.it/archivio/1/20772.pdf*, accessed on 10 August 2015.
[36] Powers op cit note 1 at 334.

the concept by looking at the fundamental principles on which it is based.[37] On this premise they firstly argue that good faith encompasses a duty to act:

> '…fairly and equitably towards the other party.'[38]

However there might be differences in determining the meaning of 'acting fairly' and 'equitably' in commercial transactions therefore this determination may depend on the mode of behavior or way of thought of the judge or presiding officer.[39]

Secondly, it is argued that good faith could be a duty which requires a certain level of 'trust and confidence' between the parties.[40] This principle of trust and confidence is also well established in the UK labour law, which provides that:

> 'Every contract of employment has an implied term in English law that the employer and employee will act with trust and confidence towards each other, even though such a term may be excluded by express terms.'[41]

In stressing the importance of this principle the Employment Appeal Tribunal of England in the *Morrow* case[42] held that:

> 'A finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract…'[43]

Furthermore the position of mutual trust and confidence in the UK contracts of employment was addressed by the House of Lords in the *Malik* case,[44] when Lord Steyn stated that:

> 'The evolution of the implied term of trust and confidence is a fact. It has not yet been endorsed by your Lordships' House. It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.'[45]

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[37] Pettinelli op cit note 35.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ravi Chandran 'Fate of trust and confidence in employment contracts' (2015) 27 *SACLJ* 31at 1.
[42] *Morrow v Safeway Stores* [2002] IRLR 9.
[43] *Morrow* supra note 27 para 9.
[44] *Malik v Bank of Credit and Commerce International* SA [1998] AC 20.
[45] *Malik* supra note 29 para 44-5.

This observation by Lord Steyn appears to indicate that the courts adopted a flexible approach to trust and confidence in law by basing their decisions on the considerations of 'justice and policy.'[46] Although this might be the right approach to follow in terms of national contract legislation, it can however be problematic in international trade instruments since there is a greater need for certainty in the latter instance because of the different national laws.

Thirdly, it is said that good faith brings forth the establishment of a set of standards of reasonable behavior in contractual relations.[47] It can be argued that the determination of such 'reasonable behavior' that is established by good faith may require an inspection similar to the 'reasonable man test' that is applicable in criminal law and in the law of delict or tort.[48] In such a case, it perhaps requires consideration of whether the contracting parties carried out their contractual obligations in a way that accords with that of a reasonable contracting person in a commercial transaction under like circumstances. If the answer is affirmative, surely the standards of reasonable behavior of good faith may be considered to have been observed.

Lastly, some scholars such as Pettinelli argue that the meaning of good faith is attainable by defining what constitutes 'bad faith', which is considered to be the easier to define than the former.[49] Petinnelli's argument is perhaps inspired by that of Associate Professor Summers who in 1968 argued that finding a meaning to good faith can be achieved by using the term as an 'excluder',[50] in other words, he noted that:

> 'It is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.'[51]

Summers went further by identifying six categories of bad faith in contract performance that include:

> 'the evasion of the spirit of the deal, lack of diligence and slacking off, willfully rendering only 'substantial' performance, abuse of a power to specify terms, abuse of a power to

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[46] Richard Stone & James Devenney *Taxes, Cases and Materials on Contract Law* 3 ed (2014) 247.
[47] Pettinelli op cit note 35 at 6.
[48] Alan D. Miller & Ronen Perry 'The Reasonable Person' (2012) 87 *NYULR* 323 at 328.
[49] Pettinelli op cit note 35 at 6.
[50] Robert S. Summers 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 *VLR* 195 at 196.
[51] Ibid.

> determine compliance, and interference with or failure to cooperate in the other party's performance.'[52]

The importance of identifying acts of bad faith to give a definition to good faith was expressed by Lord Scott in the *Manifest Shipping* case,[53] when stating that:

> '…Unless the assured has acted in bad faith he cannot, in my opinion, be in breach of a duty of good faith, utmost or otherwise.'[54]

However, Professor Summers's perspective on giving a meaning to good faith by using the term as an excluder has not gone without criticism.[55] For example Patterson has argued that:

> 'The excluder analysis cannot work without the existence of a substantive notion upon which the excluder term does its work. Summers never supplies the substantive host, and for that reason alone his claims for the 'felicity' of the excluder analysis cannot be sustained.'[56]

Additionally it can be argued that the excluder analysis can similarly not be adopted in the context of international transactions since the determination of what constitutes bad faith conduct will differ depending on the area of international trade that is governed by the international trade instrument.[57] It can therefore be argued that his approach does not solve the problem of the elusive nature of good faith in international trade instruments since bad faith is also equally not readily ascertainable.[58]

Professor Burton opposed the 'excluder' approach to good faith and articulated the 'forgone opportunities' approach which provides that good faith could be defined through economic theory by examining the potential costs of a breach of an obligation.[59]

Although it is more specific in finding a determination of good faith, such an approach may not be practical in international commercial transactions since the 'forgone opportunities' in

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[52] Paul MacMahon 'Good Faith and Fair Dealing as an Underenforced Legal Norm' available at *http://eprints.lse.ac.uk/60567/1/WPS2014-22_MacMahon.pdf*, accessed on 10 August 2015.
[53] *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 111.
[54] *Manifest* supra note 36 para 111.
[55] Dennis M. Patterson 'Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement under Article Nine' (1988) 137 *UPLR* 335 at 346.
[56] Ibid at 349.
[57] Emily Hough 'the Doctrine of Good Faith in Contract Law: A Nearly Empty Vessel?' available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=622982*, accessed on 13 September 2015.
[58] Ibid.
[59] Steven J. Burton 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 *HLR* 369 at 378-94.

international trade instruments may not be economically apparent.[60] This approach could, therefore, lead to further ambiguity if applied to international trade instruments.

(a) The problem with the meaning of good faith

The difficulty with achieving uniformity in the meaning of good faith is a result of several factors. The first problem is that such meaning often takes either a subjective or additional objective dimension.[61] For example article 1-201 (19) of the Uniform Commercial Code (U.C.C) originally defined good faith as:

> 'Honesty in fact in the conduct or transaction concerned.'

This is a subjective definition of good faith which is often referred to as a 'pure heart and empty head' standard.[62] In his analysis of the subjective meaning of good faith in the U.C.C Volin[63] argued that:

> 'The primary concern under the subjective theory of 'good faith' is whether the particular purchaser believed he was in good faith, not whether anyone else would have held the same belief.'[64]

Furthermore he continues that:

> 'The test to determine whether one is acting in 'good faith' under this standard is what the particular person did or thought in the given situation and whether or not he was honest in what he did. Under this theory, a purchaser of goods must have actual knowledge of some other person's interest in the goods in order to be found lacking in 'good faith': Mere suspicion is not enough. Gross negligence is insufficient. Mere failure to inquire is not enough to impeach his title, although he must not shut his eyes to the means of knowledge which he knows are at hand.'[65]

Whereas according to Volin the objective theory of good faith meaning entails that:

> '…the trier of fact must determine what an ordinarily prudent man would have done or thought under the same circumstances. One's actual state of mind is no longer the critical

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[60] Leonard S. Volin 'Uniform Commercial Code - Sections 1-201 (19), 2-103 (1) (b), 9-307 (1) – Good Faith Requirement for Buyer in Ordinary Course – Sherrock Brother v. Commercial Credit Corporation' (1972) 14 *BCLR* 343 at 345.
[61] Ibid at 347.
[62] Mark E. Wilson 'What is Good Faith? Subjective and Objective Standards for Banks Accepting Payment Offers' available at *http://apps.americanbar.org/buslaw/committees/CL130000pub/newsletter/201203/wilson-kerman.pdf*, accessed on 5 October 2015.
[63] Volin op cit note 57 at 348.
[64] Ibid.
[65] Ibid.

> factor; one's innocence, suspicion or actual notice is no longer relevant. Instead, the inquiry goes to the prevailing community standards as to what is decent, fair or reasonable.'[66]

Therefore Volin argues that a party who seeks to show his own good faith in terms of the objective test must:

> '…not only demonstrate a lack of actual knowledge but must also show that he made the efforts which an ordinarily prudent businessman would have made in order to determine if any third party rights did exist. Even a negligent failure to ascertain third party rights could be a violation of the objective standard if the prevailing customs and practices in the trade would require a prudent businessman to ascertain these rights under the circumstances.'[67]

Farnsworth argues that:

> 'Both common sense and tradition dictate an objective standard for good faith performance.[68]'

The objective meaning of good faith therefore imposes a stricter good faith requirement on a buyer while the subjective meaning requires only that the buyer be 'unaware of any conflicting claims in the goods involved in the transaction.'[69] Arguably if uniformity is to be achieved in the meaning and application of good faith a balance must be reached between the subjective and objective meanings of good faith. Such a balance can be achieved for example by including both the subjective and objective dimensions of good faith in a provision of an international trade instrument that seeks to define good faith. An example of such incorporation can be found in the 1950 proposed draft of the U.C.C that had a general good faith provision in section 1-201[70] stating that:

> 'Good faith means honesty in fact in the conduct or transaction concerned. Good faith includes observance by a person of the reasonable commercial standards of any business or trade in which he is engaged.'

The second problem with the meaning of good faith has to do with the context in which it is used. The meaning of good faith changes depending on the context.[71] This point was made in the English *Yam Seng* case[72] when it was argued that:

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[66] Ibid at 349.
[67] Ibid.
[68] Allan E. Farnsworth 'Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code' (1963) 30 *UCLR* 666 at 672.
[69] Volin op cit note 57 at 349.
[70] Ibid.
[71] Ibid.

> 'What good faith requires is sensitive to context.'[73]

Furthermore it was argued that:

> '…the content of the duty is heavily dependent on context and is established through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law.'[74]

Changing the meaning of good faith depending on the context of its usage may make it readily applicable for courts and tribunals. However this can present difficulties. Firstly, the constant changing of the meaning of good faith based on its context will arguably not ensure legal certainty in its definition. Furthermore, uniformity in the meaning of a legal concept is less likely to be attained if it changes continuously depending on the context.

II The application of good faith

The concept of good faith has not only been applied in contractual obligations, it has also found use outside the confines of contract law.[75] The application of good faith outside contract law can be seen, for example, in the Netherlands where the concept is applied in the law of succession, bankruptcy law, company law and private international law.[76] The application of good faith goes even further in German law where it is not only applicable in the whole of private law, but even extends to procedural law and administrative law.[77] It is clear that good faith can find application in most fields of law but for the purposes of this dissertation the focus will be on contract law to determine if there is a possibility of uniformity in application.

As a starting point, most European civil codes apply pre-contractual good faith that includes a duty to inform; furthermore such a duty also prohibits the parties from breaking off negotiations in a manner that is contrary to pre contractual good faith.[78] Secondly, some legal systems apply good faith for interpretation of the contract and this role is contained either in statutory provisions on good faith interpretation and in other legal systems good faith interpretation has been established by the courts.[79] The obligation of good faith interpretation can

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[72] *Yam Seng Pte Limited v International Trade Corporation Ltd* [2013] EWHC 111 [QB].
[73] *Yam* supra note 72 para 141.
[74] *Yam* supra note 72 para 147.
[75] Martijn Hesselink 'The Concept of Good Faith' in *Towards a European civil code* 3 ed (2004) 471- 498.
[76] Ibid.
[77] Ibid at 485.
[78] Ibid at 479.
[79] Ibid at 480.

also be found in international instruments, such as the Vienna Convention on the Law of Treaties that provides:

> 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[80]

In some legal systems, good faith has a role of validating a contract, meaning that a violation of a good faith duty may lead to invalidity of a contract. This application of good faith is provided in a general good faith clause that can hold standard terms void on the basis of such clause.[81] However, it is not a given fact that a violation of a good faith clause will surely invalidate a contract. This was the view in the English *Gold* case,[82] where the court interpreted an express contractual good faith provision narrowly. It was held that:

> '...good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.'[83]

It can be seen that the concept of good faith is applied in different stages of contracting. Despite such acceptance, however, the concept has also had a somewhat limited, or conditional, application in some international trade instruments and national legal systems.[84] This has resulted in restraint in the application of good faith.

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[80] Article 31 (1) of the Vienna Convention on the Law of Treaties, 1980.
[81] Hesselink op cit note 75 at 479.
[82] *Gold Group Properties v BDW Trading* [2010] EWHC 323 (TCC).
[83] *Gold* supra note 82 para 91.
[84] Powers op cit note 1 at 336.

CHAPTER 3 GOOD FAITH IN INTERNATIONAL INSTRUMENTS

The concept of good faith is found in international trade instruments either as an explicit provision or implied by the contractual terms between the parties.[85] However, there is often uncertainty regarding the scope and extent to which either the contract or the relationship between the parties must adhere to the obligation to act in accordance with good faith.[86] In this chapter, the dissertation will look at the different contentions regarding the inclusion of good faith in international trade instruments in an attempt to determine if there can be unification in the meaning and application of the concept.

I United Nations Convention on Contracts for the International Sale of Goods

The main purpose of the 1980 Vienna Convention was to adopt a compromised uniform law on the international sale of goods.[87] Therefore the preamble of the CISG provides that the adoption of such uniform laws can contribute to the removal of legal trade barriers and thereby promote international trade.[88]

There were three stages of development that led to the adoption of this convention.[89] The first stage took place between 1970 and 1977, where the Working Group had nine sessions to draft the Convention.[90] By 1976, they had completed and unanimously passed a draft Convention on the International Sale of Goods (Sales Draft), which set out the rights and obligations of buyers and sellers under sales contracts.[91] The Working Group Draft on Formation of the Sales Contract (Formation Draft) was completed in 1977.[92] In the second stage, the United Nations set up the UNCITRAL, which unanimously approved the 1978 UNCITRAL Draft Convention on Contracts for the International Sale of Goods. The final stage saw the adoption of the CISG in 1980 and it was initially signed by eleven states.[93]

During this process the inclusion of the good faith concept was subject to extensive debate amongst the drafters of the CISG.[94] This was for different reasons. First, scholars have said that

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[85] Powers op cit note 1 at 335-338.
[86] Ibid.
[87] Larry DiMatteo (ed) *International Sales Law – a Global Challenge* (2014) 8.
[88] Ibid.
[89] Ibid.
[90] Ibid at 11.
[91] Ibid.
[92] Ibid at 12.
[93] Ibid at 14.
[94] Powers op cit note 1 at 342-348.

there was a fear amongst commentators that there could be no general agreement on the meaning of 'good faith' in the context of international sale of goods.[95] Secondly, there had been different opinions on the role that should be played by good faith, which ranged from the idea that it should be viewed as 'an obligation present at all stages of the contracting process' to the view that good faith 'should not be explicitly mentioned in any provision.'[96] A compromise on these contrasting views was reached by the provisions of article 7 (1) of the CISG.

(a) Article 7 (1)

The nature of the CISG as a multilateral convention means that a uniform application of its provisions is crucial. This goal of uniformity is reflected in the provisions of article 7 (1) which emphasise the 'international character' of the CISG.[97] Keily argues that this provision was essentially crafted to counteract the 'homeward trend' in interpretation; that is, 'the risk that judges from different cultural and legal backgrounds are apt to rely upon individual national legal heritages.'[98] Furthermore, it is argued that this provision was seen as an understanding between those who feared that the concept of good faith was vague and thereby took different meanings in various legal systems, and those who supported the use of a 'broad standard to monitor inappropriate conduct.'[99] An understanding of such points of view demands examination of the wording of article 7 (1). The article provides that:

> 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

There has been an ongoing debate on the meaning and scope of applying the good faith concept in the CISG despite the inclusion of the concept in article 7 (1),[100] which has been variously described by commentators as an 'awkward compromise', a 'strange arrangement' and 'peculiar provision in the CISG'.[101] The main concern expressed by scholars about this provision

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[95] Alejandro M. Garro 'Reconciliation of Legal Traditions in the U.N Convention on Contracts for the International Sale of Goods' (1989) 23 *ILR* 443 at 466.
[96] Ibid at 466.
[97] Troy Keily 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 1 *VJICLA* 15 at 18.
[98] Ibid.
[99] Alexander S. Komarov 'Internationality, Uniformity and observance of Good Faith as criteria in interpretation of CISG' (2005-06) 25 *JLC* 75 at 83.
[100] John Felemegas 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and uniform interpretation' Review of CISG (2000-2001) *PILR* 115 at 179.
[101] Keyes & Wilson op cit note 16 at 64.

is whether the phrase 'the need to promote' applies to the 'observance of good faith' as well as 'uniformity.'[102]

Furthermore, it is argued that the provision of good faith in article 7 (1) extends only to the interpretation of the CISG and not to contract performance.[103] It therefore does not directly impose an obligation of good faith on the contracting parties.[104] This could be because good faith was initially perceived as a concept that could have a limited impact on international trade.[105] The subsequent application of the CISG has, however, shown that good faith plays 'a bigger role than being merely a tool of interpretation.'[106] The realization that good faith could potentially have a larger role than it had been anticipated was expressed in the Secretariat Commentary, in reference to instances where a good faith obligation might be implied in the CISG, when it was said that:

> 'The principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention.'[107]

It is argued that another justification for the limited scope of good faith in article 7 (1), besides underestimating the role that good faith can potentially have in the performance of the contract, could be that the drafters did not want to have 'a stringent good faith provision' imposed on the parties that could possibly hinder the uniformity purpose of the CISG.[108]

However, some scholars argue that since the interpretation of the CISG may lead to the application of the good faith clause it was not the CISG, which was interpreted, but the contract.[109] In such a connection, Professor Eörsi submitted that the interpretation of the two could not be separated since the CISG 'constitutes the law of the parties insofar as they do not make use of article 6 on freedom of contract.'[110] Furthermore, review of decisions and awards have demonstrated the difficulty of separating the interpretation of the CISG from interpreting the contract and applying good faith to the conduct of the contracting parties.[111]

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[102] Powers op cit note 1 at 339.
[103] DiMatteo (ed) op cit note 87 at 131.
[104] Hough op cit note 57 at 1.
[105] DiMatteo op cit note 87 at 131.
[106] Ibid at 127.
[107] Ibid at 128. The 'examples' mentioned in the Secretariat Commentary refers to rules in the CISG that reflect the concept of good faith aside from article 7.
[108] Ibid.
[109] Alexander op cit note 57 at 83.
[110] Ibid.
[111] Ibid.

Although this argument may suggest that article 7 (1) impliedly imposes a duty of good faith on the parties, it is still not certain that it does. It can therefore be argued that uniformity in the meaning and application of good faith can only be achieved if international trade instruments contain separate provisions for the interpretation of the international trade instruments and for the imposition of an obligation of good faith on the contractual relationship of the parties. This will arguably provide clarity in the application of the concept by such instruments in providing that the concept applies not only to the interpretation of such an instrument, or the contract between the parties, but also to all aspects of an international commercial transaction regulated by such instrument.

In the case of an implied good faith obligation between contracting parties, Eörsi demonstrated the application of the good faith concept in relation to the CISG rule that provides that acceptance is effective when received at the other party's place of business,[112] by noting that:

> '[u]nder article 24, a declaration 'reaches' the addressee when 'it is…delivered…to his place of business or mailing address…' If a party knows that the other party who has a place of business is away from his home for a considerable period of time, and he nevertheless sends that declaration to the mailing address, he may violate the requirement of good faith.'[113]

It can be argued from the above that the wording of article 7 (1) has the potential of contributing to the lack of clarity on the part that the concept should have in international commercial transactions. Therefore a starting point in seeking a uniform interpretation and application of good faith in international trade instruments would perhaps demand a widening of the scope of good faith application in all international instruments.

(b) Article 7 (2)

As discussed, the CISG was drafted to act as a uniform sales law but it does not provide solutions to all the problems that may arise from international commercial transactions.[114] Article 4 provides that the issues governed by the CISG are limited to the formation of the contract and to the rights and obligations of the parties from such a contract. This article continues to

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[112] Ibid.
[113] Michael Maggi *Review of the Convention for the International Sale of Goods (CISG) 2000-2003* (2004) 49.
[114] Franco Ferrari & Harry M Fletcher et al (eds) *The draft UNCITRAL digest and beyond: cases, analysis and unresolved issues in the U.N. Sales Convention: papers of the Pittsburgh Conference by the Center for International Legal Education (CILE)* (2004) 157.

expressly exclude from the CISG's scope issues associated with the validity of the contract and the effect the contract may have on the property in the goods sold.[115] Other express exclusions can be found in articles 2, 3(2) and 5 of the CISG. Additionally, other situations such as the capacity of the parties, the authority on a third person to conclude the contract on another person's behalf, and limitations of action or prescription issues are not mentioned and are therefore outside the scope of the CISG.[116] Such limitations on the scope of the CISG present problems which may require gap-fillings similar to those that exist in any type of incomplete body of laws.[117] Therefore article 7 (2) of the CISG was drafted to fill any gaps that may arise in the CISG, by stating that:

> 'Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

It is argued that the purpose of article 7 (2) and gap-filling is directly linked to article 7 (1) and interpretation because they are aimed at uniformity in the application of the CISG.[118]

It is important to understand the matters to which the rule set forth in article 7 (2) applies in order to understand its unification function.[119] It is argued that the gaps referred to in article 7 (2) are not the matters excluded from the scope of application of the CISG, such as the excluded issues observed in article 4 and other articles mentioned above, but to 'issues to which the CISG applies but which it does not expressly resolve' such as the good faith concept.[120]

Furthermore, it can also be argued that good faith is one of the 'general principles' referred to in article 7 (2) of the CISG. Such principles on which good faith is based are found throughout the CISG. Examples of such manifestations are: article 16 (2) (b), which makes an offer irrevocable if it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer;[121] article 21 (2), which deals with late acceptance that

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[115] Nives Povrzenic 'interpretation and gap-filling under the United Nations convention on contracts for the international sale of goods' available at *http://www.cisg.law.pace.edu/cisg/text/gap-fill.html*, accessed on 24 July 2015.
[116] Ibid.
[117] Ferrari & Fletcher op cit note 114 at 157.
[118] Ibid.
[119] Ibid at 158.
[120] Ibid.
[121] DiMatteo op cit note 87 at 128.

was sent in such circumstances that, had its transmission been normal, it would have reached the offeror in due time,[122] and articles 85 to 88, which impose on the parties obligations to preserve the goods.[123] An implied reference to the good faith concept in the CISG is not limited to these examples.[124]

Furthermore, the aim of article 7 (1) is closely linked to article 7 (2) because the concept of good faith, expressed in article 7 (1), is often used for gap filling in most domestic legal systems. This particular function of good faith in continental Europe will be discussed in the next chapter of this dissertation.

Given that the main purpose of the adoption of the CISG was to promote uniformity in the application of provisions on the international sale of goods.[125] It is an important instrument in determining whether uniformity in the meaning and application of the good faith concept is attainable. It can be concluded that the wording of article 7 falls short of imposing certainty on the role of good faith in the CISG particularly with regard to the contractual relationship between the parties. This problem amongst others presents difficulty in the application of good faith as seen in court decisions that have applied the CISG.[126]

(c) The application of article 7(1) of the CISG

In practice, the lack of definition of good faith and the limited or perhaps unclear application it has been granted by article 7 (1) has led to the States that have ratified the CISG to look upon national legislation to give meaning and application to the concept however it is argued that decisions and awards from cases dealing with article 7 (1) rarely examine the concept in a meaningful way.[127] This argument will be examined by looking at three unreported cases.

In the first instance, there is often uncertainty regarding the type of acts that are to be regarded as constituting good faith. This can be seen in the 1993 case of *Eximin v Textile and Footwear*, [128]a case that involved parties from Israel and Belgium and concerned a breach of a registered trademark from the sale of denim boots. The court held that since both parties knew of

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[122] Ibid.
[123] Ibid.
[124] Ibid. DiMatteo notes that other implied references to good faith are in articles 29 (2), 37, 46, 40, 47 (2), 64 (2) and 82 of the CISG.
[125] DiMatteo op cit note 87 at 8.
[126] Ibid at 128.
[127] Ibid.
[128] *Eximin v Textile and Footwear* (Case Number 3912/90 of 22 August 1993), available at *http://cisgw3.law.pace.edu/cases/930822i5.html*, accessed on 24 August 2015.

the possibility that there might be an already existing registered trademark, and neither investigated the matter, both parties acted with a lack of good faith. Therefore, liability for the damage should be allocated between the parties. Although the CISG was not directly applied, this case is argued to be perhaps the clearest exposition of bad faith as 'a negative or foil' for a determination of good faith.[129]

Although article 7 (1) does not provide for a duty of good faith to be observed between the contracting parties the courts have however held that such a duty exists nevertheless. This position was confirmed in the Hungarian case,[130] in which a Hungarian supplier of mushrooms was given an outdated guarantee by an Austrian buyer. The court held this act to be a breach of the duty of good faith. The court specifically stated that in its view, good faith is 'not only an interpretive tool to be applied to the CISG itself, but a standard of behavior to be observed by the parties too.'[131]

Another case in which the CISG was applied to determine the conduct of the parties in the commercial transaction was in a German case[132] in which a seller sold a used car to a buyer, both parties being car dealers. The documents showed that the vehicle was first licensed in 1992 and the odometer was low. The sales contract excluded any warranty. The buyer subsequently sold the vehicle to a customer who discovered that the vehicle had been first licensed in 1990 and that the mileage of the odometer was higher. The buyer paid damages to his customer and demanded the same amount as damages from the seller. The court applied the CISG stating that 'for a party to avail itself of its provisions, it must come to the court having acted in good faith.' In this instance it was found that the seller could not rely on the exclusion of warranty because its actions with respect to the vehicle were not in good faith. Therefore good faith in this instance is 'substantive, limiting the rights of the party to invoke other legal rights.'[133]

The case law on article 7 (1) the CISG demonstrates that courts and tribunals have frequently used their own domestic legislation or legal reasoning by gap filling to give clarity to the CISG obligation of good faith. Although this practice is helpful, it can be argued that it

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[129] Benedict Sheehy 'Good Faith in the CISG: The interpretation problems of article 7' available at *http://law.bepress.com/cgi/viewcontent.cgi?article=1815&context=expresso*, accessed on 20 August 2015.
[130] Hungary, Arbitration Court of the Chamber of Commerce and Industry of Budapest (Docket Number Vb 94124 of 17 November 1995), available at *http://cisgw3.law.pace.edu/cases/951117h1.html*, accessed on 24 August 2015.
[131] Sheehy op cit note 129 at 28.
[132] Germany, OLG Köhn (Case Number 22 U 4/96 of 21 May 1996), available at *http://cisgw3.law.pace.edu/cases/960521g1.html*, accessed on 24 August 2015.
[133] Sheehy op cit note 129 at 29.

defeats one of the reasons the CISG had been drafted, which was to avoid the homeward trend in interpretation.[134]

II UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles are said to be a 'construct of international trade laws that are common to most legal systems.'[135] The criterion used was not the determination of the rules that was:

> '…adopted by the majority of jurisdictions, but rather which of the rules under consideration had the most persuasive value or appeared to be well-suited for cross border transactions or both.'[136]

Furthermore it is said that the objective of the drafters was to make the UNIDROIT Principles 'receptive to the actual needs and expectations of international trade practice.'[137] The Principles therefore contain provisions that are intended to provide fair conditions to international commercial transactions.

The parties to an international commercial contract can chose the UNIDROIT Principles to govern their contract.[138] When the UNIDROIT Principles apply as the law governing a contract, such a contract must be:

> 'construed based on the concepts and provisions of the UNIDROIT Principles in light of the special conditions of international trade, even though sometimes principles of national law may be taken into consideration provided that they are shown to be generally accepted amongst the various legal systems.'[139]

Good faith is one of such concepts that form part of the UNIDROIT Principles in terms of which such contracts must be concluded. However the UNIDROIT Principles do not define good faith, although it is mentioned along other concepts such as 'fair dealing' and 'reasonable commercial standards of fair dealing' who are collective said to embody the concept of good

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[134] Keily op cit note 97 at 18.
[135] Michael Joachim Bonell '[t]he UNIDROIT Principles of International Commercial Contracts: Why? What? How?' (1995) 69 *TLR* 1121 at 1129.
[136] Ibid.
[137] Ibid at 1137.
[138] Bonell op cit note 135 at 1125.
[139] Mohammad Farhan 'The Sensibility of Good Faith and Fair Dealing Doctrine' available at *http://myenergylaw.blogspot.com/2008/12/sensibility-of-good-faith-and-fair.html*, accessed on 22 August 2015.

faith.[140] The good faith concept is included in different parts of the UNIDROIT Principles either expressly or impliedly.

(a) Article 1.7

The concept of good faith and fair dealing in the UNIDROIT Principles[141] is set out in article 1.7 which provides that:

> '(a) Each party must act in accordance with good faith and fair dealing in international trade.
>
> (b) The parties may not exclude or limit this duty.'

This provision is distinctively different from article 7 (1) of the CISG because it expressly imposes a duty of good faith on the parties and 'conveys the expectation that both parties will act in accordance with good faith and fair dealing.'[142] Furthermore, good faith is perceived as a fundamental principle, and, where the UNIDROIT Principles are applicable to a contract, the parties cannot contract out of this principle, even though party autonomy is recognized.[143] These two provisions provide clarity on the application of good faith in the contractual relationship of the parties, therefore having such a provision in all international trade instruments can give direction on the function of good faith between the parties.

Despite this requirement of observance of good faith, the comments on article 1.7 do not elaborate on the other functions of good faith and the extent to which such functions are covered by the UNIDROIT Principles.[144] This omission creates uncertainty regarding the function of good faith in the UNIDROIT Principles, similar to the difficulty in article 7 of the CISG. However, the functions of good faith in the UNIDROIT Principles can be deduced from the following arguments. Firstly, Hartkamp notes that the illustrations in the comments to article 1.7 refer to provisions in the UNIDROIT Principles which, either directly or indirectly, refer to the functions of good faith and fair dealing, for instance article 4.1 refers to the interpretive function of the good faith concept, [145] by providing that:

> '…standard terms should be interpreted primarily in accordance with the reasonable expectation of their average users irrespective of the actual understanding which either of the

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[140] Allen E. Farnsworth 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws' (1995) *TJICL* 47 at 60.
[141] Bonell op cit note 90 at 1129.
[142] Indira Carr & Peter Stone *International Trade Law* 5 ed (2013) 91.
[143] Ibid.
[144] Arthur Hartkamp 'The concept of good faith in the UNIDROIT Principles for International Commercial Contracts' (1995) 3 *TJICL* 65 at 69.
[145] Ibid.

> parties to the contract concerned, or reasonable persons of the same kind as the parties, might have had.'

Furthermore, the concept of good faith has a supplementing function in article 5.2 which states that implied obligations may stem from good faith and fair dealing as well as from reasonableness.[146] Lastly, Hartkamp notes that the restrictive function of good faith is noticeable in article 7.4.13 (2) regarding the payment of a specified sum stipulated for the case of non-performance providing that:

> '…notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to harm resulting from the non-performance and to the other circumstances.'

Other restrictive functions of good faith can be found in article 6.2.3, which provides that in case of hardship, the court may terminate or adapt the contract, and article 7.1.6, which provides that unreasonable exemption clauses may not be invoked.[147] Hartkamp therefore argues that it is less likely that the drafters of the UNIDROIT Principles intended to limit the restrictive function of good faith to the examples specified therein.[148] In addition, he argues that the concept of good faith should be available in other circumstances, for example, to:

> '…bar a claim based nonperformance, where the aggrieved party, by its previous conduct, induced the other party to believe that the aggrieved party would not rely on nonperformance as a cause of action.'[149]

The difficulty expressed by Hartkamp is similar to that of the Secretariat Commentary, on the application of good faith in the CISG, in that the concept of good faith has a larger role to play than its scope in article 1.7 of the UNIDROIT Principles and article 7 (1) of the CISG. It can therefore be argued that attempts to obtain uniformity in the application of good faith must be focused on expressly extending the scope of good faith to all contractual aspects of a particular international trade instrument, the contractual parties and other relevant aspects of the contract without limitations and contractual conditions.

Another point of contention that may arise that is similar to the CISG and other most international instruments, is that the concept of 'good faith' is not defined in the UNIDROIT

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[146] Ibid at 70.
[147] Ibid.
[148] Ibid.
[149] Ibid at 71.

Principles.[150] This difficulty is often dealt with by reference to what constitutes bad faith, in other words, to what acts are generally inconsistent with the instrument or contractual terms of the parties.[151] This method of finding a meaning for good faith may not be readily ascertainable for instance in cases where it is difficult to establish a determination of bad faith. Inconsistent behavior can be said to be one aspect of lack of good faith; for instance, article 1.8 specifically prohibits a party from behaving inconsistently 'with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.'[152] Equally, the inclusion of unexpected or surprising terms in contracts shows lack of good faith and fair dealing.[153] Article 2.1.20 deals with this by providing that, if standards terms contain a term that the party would 'not reasonably have expected, that term will be ineffective, unless it has been expressly accepted by that party.'[154]

Furthermore, although good faith is not defined, Bonell argues that:

> 'since it is coupled with 'fair dealing', it is to be understood in an objective sense, as synonymous with what is elsewhere in the UNIDROIT Principles referred to as 'reasonable commercial standards of fair dealing', and not in the subjective sense, as a state of mind or just 'acting honestly.'[155]

Although such an argument may be logical in the context of the UNIDROIT Principles, difficulty may arise in other international instruments where good faith is not coupled with fair dealing. It follows from this that an offered aimed at finding uniformity in the application of good faith in international instruments surely must be preceded by the determination of a unified agreed definition of the concept in international commercial transactions. This is a daunting task, as discussed in the previous chapter of this dissertation, because of the elusive nature of the concept but it cannot be avoided if a uniform application is to be achieved.

Furthermore, Bonell argues that the reference 'to good faith and fair dealing in international trade' makes it clear that in the context of the UNIDROIT Principles, the two concepts are not to be applied according to standards originally adopted within the different

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[150] Carr & Stone op cit note 142 at 91.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Bonell op cit note 90 at 1138.

national legal systems.[156] In addition, Magnus notes that both the CISG and UNIDROIT Principles expressly stress the idea that:

> '…no specific national law's concept of good faith may be applied except one that is suitable for international commercial transactions.'[157]

In other words, such domestic standards may be taken into consideration:

> '…only to the extent that they are shown to be generally accepted amongst the various legal systems.'[158]

This will prevent courts and tribunals from habitually consulting national laws to give good faith a meaning by gap filling and will also promote the international appeal of the UNIDROIT Principles.

Both the CISG and UNIDROIT Principles acknowledge that good faith plays an important part in international commercial transactions although each instrument differs regarding the role of the concept. It can also be noted that both texts do not rely exclusively on one abstract and general rule of good faith but try to specify the concept by more specific rules which elaborate it in some detail. This is perhaps a useful mechanism in trying to find application for this elusive concept within international instruments. In a number of situations the UNIDROIT Principles have proven to be of helpful assistance for the good faith application in the CISG, therefore combining the CISG and the UNIDROIT Principles one gets a good impression of what good faith in international commercial transactions should and could mean if uniformity of the concept in international trade instruments is to be achieved. [159]

(b) Article 2.15

This provision is an example of an express good faith obligation which is applicable in certain circumstances however it takes a different approach by referring to the converse of good faith, which is bad faith.[160] The bad faith addressed is limited to negotiations.[161] Article 2.15 provides that:

> '(1) A party is free to negotiate and is not liable for failure to reach an agreement.

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[156] Ibid at 1139.
[157] Ulrich Magnus 'Guide to article 7 - Comparison with UNIDROIT Principles of International Commercial Contracts' available at *http://www.cisg.law.pace.edu/cisg/principles/uni7.html,* accessed on 25 July 2015.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Ibid.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations intending not to reach an agreement with the other party.'

In contrast to article 1.7, the provisions of article 2.15 are relatively specific and thereby assist in giving notice to contractors of what standards of contract are excluded from the concept of good faith.

(c) The application of article 1.7 of the UNIDROIT Principles

The good faith provisions of the UNIDROIT Principles, in particular article 1.7, have frequently been applied by courts and arbitral tribunals in their rulings and arbitral decisions although it is not used as a binding legal rule of a contract in most cases but 'merely referred to or invoked by the tribunals or the parties as an aide to decision making.'[162]

This non legal binding application of good faith was used in an ad hoc arbitration in 2004,[163] where the arbitral tribunal held that parties have a good faith obligation to attempt to resolve disputes arising from a contract under articles 1134 (3) and 1135 of the French civil code relevant also in international trade and article 1.7 (1) of the UNIDROIT Principles. However, the tribunal concluded that:

'…the mere failure to reach an agreement was not in itself a breach of good faith and that the parties are not required to 'grant large concessions' in order to comply with the good faith obligation.'[164]

Barnes notes that this decision shows the ambiguous nature of good faith because:

'…on the one hand parties have an obligation to attempt to settle a dispute, but on the other hand, they do not have to grant large concessions to reach an agreement.'[165]

In addition, the range of possible circumstances between those extremes is the 'seemingly unknowable realm of good faith.'[166]

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[162] Naomi Julia Barnes 'Good Faith under the UNIDROIT Principles of International Commercial Contracts' available at file:///C:/Users/Adolf/Downloads/CAR9_ARTICLE14_453507552%20(1).pdf, accessed on 22 August 2015.

[163] Unknown 'Ad hoc Arbitration' available at *http://www.unilex.info/case.cfm?pid=2&do=case&id=973&step=FullText*, accessed on 19 August 2015.

[164] Ibid.

[165] Barnes op cit note 162.

[166] Ibid

Despite the problems with the application of article 1.7 as a consequence of the ambiguous nature of good faith, the courts and arbitral tribunals have nevertheless expressed the importance of applying the concept as provided in article 1.7.[167] This was found in 1997 by the Federal Court of Australia in *Federal Hughes Aircraft Systems International* case.[168]

> 'The dispute in this case concerned a bidding procedure, which had arisen between a Californian company and an Australian governmental agency after the latter awarded the contract to another bidder. According to the claimant, the defendant had failed to conduct the tender evaluation fairly and in a manner that would have ensured equal opportunity to both bidders. In this case, the Federal Court of Australia had to decide whether there was an implied duty of good faith and fair dealing in accordance with article 1.7 of the UNIDROIT Principles, which was used as a reference to supplement the domestic law. Finn J concluded that there was implied duty of good faith and fair dealing and that a general duty of good faith and fair dealing was not only recognised in a number of foreign jurisdictions but had also been propounded as a fundamental principle to be honoured in international commercial contracts.'[169]

Finn J continued to express the role of an implied duty of good faith by stating that:

> '… I consider a virtue of the implied duty to be that it expresses in a generalization of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts. It may well be that, on analysis, that standard would be found to advance little the standard that presently may be exacted from contracting parties by other means…. But setting the appropriate standard of fair dealing is, in my view, another matter altogether from acceptance of the duty itself.'

Furthermore, it can be argued that it is sensible for the good faith provisions in the UNIDROIT Principles to be applied in international commercial transactions since they are in line with the provisions of many jurisdictions that deal with the concept.[170]

Such an instance in which the application of good faith was found to be consistent with the national legislation of the contracting parties was in 2002 in an award of the Arbitration Court of the Lausanne Chamber of Commerce and Industry.[171] In this case, a Turkish company and a

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[167] Ibid.
[168] *Federal Hughes Aircraft Systems International v Air services Australia* (1997) 146 ALR 1.
[169] *Federal* supra note 115 at 37.
[170] Farhan op cit note 139.
[171] Unknown 'Award of the Arbitration Court of the Lausanne Chamber of Commerce and Industry' available at *http://www.unilex.info/case.cfm?pid=1&do=case&id=861&step=Abstract*, accessed on 22 August 2015.

company incorporated in West Indies entered into an agreement concerning highly sophisticated equipment.[172] The contract contained two conflicting choice of law clauses, one was in favour of English law and the other in favour of Swiss law. In view of the uncertainties as to the applicable substantive law, the arbitral tribunal suggested the Parties choose the UNIDROIT Principles as the applicable law. The contracting parties agreed to do so, also in view of the fact that the application of the UNIDROIT Principles was not seen as precluding the application of the English law if applicable as maintained by one party and the Swiss law if applicable as proposed by the other party.[173] The arbitral tribunal found that one of the parties had not properly performed its obligation arising from the contract, amongst other provisions the arbitral tribunal referred to article 1.7 on good faith and article 2.16 on the duty of confidentiality.

It can be concluded from the arguments of commentators, courts and arbitral decisions that good faith and fair dealing is one of the fundamental concepts of the UNIDROIT Principles. Despite having this prominent position, it is up to the courts or arbitral tribunals to make determinations to reach rational solutions in interpreting the provisions in the UNIDROIT Principles under the ambiguous nature of good faith.[174] The nature of such good faith provisions is said to merely provide 'umbrella principles to give space to judges to give space for judges to apply justice fairness, and not to forget, objective standard.'[175]

III Principles of European Contract Law

The process of establishing the PECL by the Commission on European Contract Law began in 1982; Part I of the PECL dealing with performance, non-performance and remedies was published in 1995, Parts I and II was published in 1999.[176] The Third Commission started to prepare rules on compound interest, conditions and the effect of illegality, and rules on subjects which are common to contracts, torts and unjust enrichment.[177]

According to the Commission on European contract law the main purpose of the PECL is:

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[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Farhan op cit note 139.
[176]The Commission on European Contract Law 'Introduction to the Principles of European Contract law' available at *http://www.cisg.law.pace.edu/cisg/text/peclcomments.html*, accessed on 20 August 2015.
[177] Ibid.

> '…to serve as the first draft of a part of a European Civil Code and since common law does not exist in the European Union, the PECL has been established by a more radical process.'[178]

No legal system has formed the basis of the PECL, the Commission has paid attention to 'all the systems of the Member States' however not each of them has had influence on every issue dealt with and the 'rules of the legal systems outside of the Communities' have also been considered as well as international trade instruments such as the CISG.[179] It is also said that some of the PECL reflect 'ideas which have not yet materialized in the law of any state.'[180]

The PECL and its good faith provisions are a product of a committee without law-making authority thus they are made to serve as statements of 'derivative general legal norms' rather than as 'descriptions of any existing body of law.'[181] Therefore the PECL is said to lack formal legal authority, although the drafters expected such an authority to arise through the adoption or use of the PECL by legislators, judges, arbitrators, and contracting parties.[182]

The PECL are not necessarily international trade instruments like the CISG and the UNIDROIT Principles but their good faith provisions are relevant to the dissertation since the PECL encompass contractual principles from numerous jurisdictions. Hence two good faith provisions of the PECL, articles 1:106 (1) and 1:201 will be discussed.

(a) Article 1:106 (1)

This provision sets out the general criteria for interpretation and supplementation of the PECL. It states that:

> '(1) These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainly in contractual relationships and uniformity of application.'

The purpose of such a provision is said to:

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[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] Harry Flechtner 'Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality' (2001) 13 *PILR* 295 at 296.
[182] Ibid.

> '…avoid the risk of parochial interpretation of an international uniform law text both from the point of view of the techniques used and of the possible influence of domestic law legal concepts.'[183]

It is derived from article 7 of the CISG which is often considered as 'the paradigm of the concept of good faith' in international trade instruments. Article 1:106 does not, however, refer to the 'international character' of the PECL as an element to be taken into account in interpreting it.[184] The reason for this could be that although the PECL is said to constitute a 'supranatural' body of laws as far as their origin are concerned, they define themselves as 'general rules of contracts' for European countries and do not restrict their application to international transactions.[185]

Furthermore, although the PECL follows the example of article 7 of the CISG, where the observance of good faith in international trade is expressly mentioned as a standard of interpretation of the CISG it differs from the CISG because the PECL contains other provisions mentioning good faith and fair dealing in negotiations, performance and interpretation of the contract.[186]

Following the example of article 7 of the CISG, article 1:106 (1) underlines the importance of a uniform application of the PECL. The practical experience of other international trade instruments such as the CISG has, however, demonstrated the difficulties experienced when trying to achieve a truly uniform application of a uniform law text.[187] Furthermore Antoniolli notes that:

> '…since the PECL are not yet a community law instrument, one cannot rely on the binding guidelines from a supranatural judicial body such as the European Court of Justice.'[188]

Therefore, among the different means that can help reduce the danger of a non-uniform application, it is submitted that the most effective way to comply with article 1:106 is first of all 'to consider how they have been applied by judges and arbitrators in the member States.'[189]

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[183] Luisa Antoniolli & Anna Veneziano *Principles of European Contract Law and Italian Law* (2005) 42.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid at 43.
[188] Ibid.
[189] Ibid.

(b) Article 1:201

This provision is similar to article 1.7 of the UNIDROIT Principles as it imposes a duty of good faith on the conduct of the contracting parties. It states that:

'(1) Each party must act in accordance with good faith and fair dealing.

(2) The parties may not exclude or limit this duty.'

The wording of article 1:201 (1) imposes a duty of good faith on each party to the contract and defines it in such wide terms that it establishes a 'general obligation', furthermore it can be drawn from the wording used in the text that good faith is required both:

'…during the implementation of the contract and at the stage of its formation.'[190]

The initial text imposed on each party the duty to act in good faith:

'…while exercising their rights and performance of their duties'.[191]

However, in their second version the PECL have opted for a 'wider definition than the one first.'[192] Mazeaud argues that this may have been done to extend the degree of good faith to be observed by the parties in their contract.[193]

Moreover, according to Busch, good faith in article 1:201 should be 'considered as a subjective concept, whereas fair dealing has a more objective character.'[194] Furthermore, he notes that the concepts of good faith and fair dealing as laid down in article 1:201 should be distinguished from the 'good faith' of a purchaser who acquires goods or documents of title without notice of third-party claims to the goods or documents, to which this provision does not extend.[195] The provisions of article 1: 201 are also seen as supplementing the PECL and may even take precedence over other provisions of the PECL, should a strict adherence to those lead to 'a manifestly unjust result.'[196]

Furthermore, although article 1:201(2) prohibits the parties from excluding, or limiting, the duty to observe the concepts of good faith and fair dealing, it is argued the parties may to some extent influence the meaning of good faith, depending on what they have agreed upon in the

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[190] Bénédicte Fauvarque-Cosson & Denis Mazeaud et al *European contract law: materials for a common frame of reference: terminology, guiding principles, model rules* (2008) 173.
[191] Ibid.
[192] Ibid.
[193] Fauvarque-Cosson & Mazeaud op cit note 190 at 173.
[194] Danny Busch *(t)he principles of European contract law and Dutch law: a commentary* (2002) 47.
[195] Ibid.
[196] Ibid.

contract.[197] An example of such an instance is that the parties can agree that even a 'technical breach' may entitle the aggrieved party to refuse performance in a situation where its agents 'can ascertain that a technical breach has occurred but not whether or not it is a minor breach.'[198] However the Comment to article 1:201 adds that:

> 'a party should never have the right to take advantage of a term in the contract or of one of the PECL in such a way that, given the circumstances, would be unacceptable according to the standards of good faith and fair dealing.'[199]

Aside from the above mentioned provisions there are a number of specific rules expressly stated in the PECL which are seen as expressions of good faith and fair dealing.[200] Examples of such rules include: the duty not to negotiate a contract with no real intention of reaching an agreement with the other party in article 2:301; the duty not to disclose confidential information given by the other party in the course of negotiations in article 2:302; the duty not take unfair advantage of the other party's dependence, economic distress or other weakness in article 4:109; the right given to a debtor to cure a defective performance before the time for performance in article 8:104, and the right to refuse to make specific performance of a contractual obligation if this would cause the debtor unreasonable effort and expense in article 9:102.[201]

Furthermore, Storme argues that:

> '…the real function of good faith in the PECL can only be understood when one sees the interplay between express good faith provisions and the above rules, he notes that such an interplay does not only relate to performance and non-performance of contracts, but also to formation of contracts.'[202]

For the time being, there is said to be limited case law on the PECL.[203] In order to facilitate the application of the good faith concept in the PECL, Antoniolli suggests that it would be useful to follow the examples of existing initiatives regarding CISG and the UNIDROIT Principles.[204]

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[197] Ibid at 48.
[198] Ibid
[199] Ibid.
[200] Matthias E. Storme 'Good faith and contents of European private law' available at *https://www.law.kuleuven.be/personal/mstorme/goodfaithlleida.pdf*, accessed on 21 August 2015.
[201] Ibid.
[202] Ibid.
[203] Antoniolli & Veneziano op cit note 183 at 43.
[204] Ibid.

CHAPTER 4 GOOD FAITH IN NATIONAL SYSTEMS OF LAW

The concept of good faith remains controversial in national legal systems particularly because it is a 'manifestly different concept in common law and civil law jurisdictions.'[205] The common law countries 'generally remain reluctant towards good faith'.[206] An example of such a position is English lawyers who:

> '…appear to be the most resolutely opposed to it, judging that whatever useful rule the concept might play is better performed by more specific doctrines.'[207]

On the other hand, good faith is 'a key concept in civil law systems.'[208] The different position in the recognition of good faith in civil and common law jurisdictions was expressed by Mackaay when stating that:

> 'For some, good faith must be articulated as a general rule or an abstract principle; for others, good faith is better pursued, without necessarily using the term, through a myriad of particular institutions designed to ensure its presence in specific cases; the concept itself would merely serve as a moral standard. Civil law systems tend towards the former position, common law towards the latter.'[209]

Despite such contrast in the recognition of good faith in national legal systems, it is still contained in most European Civil Codes. Some of these Codes have particular provisions that include a reference to the concept, while others have provisions which indirectly stipulate that good faith is to be observed.[210] It is therefore argued that many rules in the Codes encompass the application of the concept good faith.[211]

The distinction between objective and subjective good faith is made by most European legal systems. Subjective good faith is said to include:

> '…a subjective state of mind, whilst objective good faith is usually regarded as a norm for the conduct of contracting parties.'[212]

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[205] Sheehy op cit note 129 at 28.
[206] Ejan Mackaay 'Good Faith in Civil Law Systems-A Legal-Economic Analysis' available at *file:///C:/Users/Adolf/Downloads/SSRN-id1998924.pdf*, accessed on 8 October 2015.
[207] Ibid at 7.
[208] Ibid at 2.
[209] Ibid at 4.
[210] Hesselink op cit note 75 at 471.
[211] Ibid.
[212] Ibid.

This distinction is intensified in some systems by introducing separate words for objective good faith, for example *Treu und Glauben* in the German Civil Code (BGB). Other legal systems, such as France, have not made such a distinction.[213]

Hesselink argues that:

> '…in practice, the inclusion of good faith in independent European legal systems has had success during the 20th century as the number of cases where the good faith clause has been applied increased over the last few decades.'[214]

Furthermore it is said that good faith:

> '…plays a role of interpretation in most European legal systems therefore many contain a statutory provision on good faith interpretation, while in other legal systems the interpretive role of the good faith concept has been established by the courts.'[215]

This dissertation argues that the time has come for international trade instruments to examine the concept of good faith by directing their focus beyond the provisions in such instruments and looking at how the concept is applied in the leading national legal systems that have adopted different approaches to give meaning and application to the concept, with the objective of adopting the approaches that are deemed practical for international trade instruments in order to reach a uniform meaning and application of good faith. It remains clear, however, that the courts cannot construe an international contract by reference to pre-existing good faith notions derived from national laws.[216] This chapter of the dissertation will therefore examine the meaning and application of good faith in continental Europe. This will be done by a study of different legal systems, namely Germany, Netherlands, the United States and England.

(a) German Legal System

(i) The application of good faith in the German Civil Code

The concept of good faith occupies different roles in the German Civil Code. Firstly, the Code is used in interpretation. Kornet, in his analysis notes that in terms of German law a contract is regarded as:

> '…a two-sided legal act because it is formed by two corresponding declarations of intention (*Willenserklärungen*).'

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[213] Ibid.
[214] Ibid at 478.
[215] Ibid at 479.
[216] Bruno Zeller 'Good Faith-Is it a Contractual Obligation?' (2003) 15 *BLR* 215 at 217.

They are generally referred to as the offer and its corresponding acceptance.[217] The content of the concluded contract is determined by interpreting these declarations of intention.[218] The process of interpretation in the German Civil Code is guided by sections 133 and 157. Section 157 is most relevant to good faith interpretation, providing that:

> 'Contracts are to be interpreted as required by good faith, taking customary practice into consideration.'

Furthermore, the most relevant function of good faith to this dissertation is the application of the concept to the conduct of the contracting parties; this will be discussed with relation to the meaning of good faith in the German Civil Code.

(ii) Treu und Glauben

Although the concept of good faith has been recognized in Germany for over a number of years an actual definition of the concept has not been established.[219] The term *Treu und Glauben* is used in the German Civil Code and literally means 'fidelity and faith'. It generally refers to the concept of good faith.[220] Furthermore, according to Whittaker and Zimmermann, *Treu* refers to concepts such as 'faithfulness, loyalty, reliability, and an unselfish willingness to comply with the one's given word and the obligations assumed', in other words, loyalty to the contract and *Gluabe* means 'belief in the sense of faith or reliance'.[221] It is said that the combination of '*Treu und Glauben*' is sometimes seen to transcend the sum of its component and to be widely understood as:

> '…a conceptual entity that demonstrates the existence of a relationship of trust between the two parties, and requires consideration of each party's reasonable reliance.'[222]

In addition, Kornet notes that *Treu und Glauben* requires:

> '…each contracting party to have such regard to the interest of the other party when exercising its rights, as can be reasonably expected.'[223]

In other words, a contract is not only to be performed in accordance with the letter of the contract, but also in accordance with:

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[217] Nicole Kornet *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives* (2006) 95.
[218] Ibid.
[219] Zeller op cit note 216 at 219.
[220] Zimmermann & Simon Whittaker op cit note 21 at 18.
[221] Emily M Weitzenboeck *A legal framework for emerging business models: networks as collaborative contracts* (2012) 110.
[222] Ibid.
[223] Kornet op cit note 217 at 95.

> '…its aim and purpose, and in light of what the other party, in view of the circumstances, and what has been discussed by the parties could expect, and in accordance with the usage of reasonable business dealings.'[224]

Perhaps the most comprehensive explanation of *Treu und Glauben* function was presented by Kornet when she said that:[225]

> '*Treu und Glauben* is to be regarded as a legal ethical principle, that allows extralegal, social norms and moral-ethical principles to be incorporated in the law that are not otherwise capable of being incorporated in the law, but which are seen to provide the foundation for the legal order.'[226]

Therefore, if a contract is to be interpreted in terms of *Treu und Glauben*, consideration has to be given to the 'prevailing economic and social order and immanent legal ethics.'[227] Although this may be practical in terms of domestic contract law, it can be argued that if a uniform meaning of good faith was to be adopted in all international trade instrument the suggestion of Kornet could make achieving such an objective impossible because of the contrasting economic and social orders that may prevail in the countries of the parties to an international commercial transaction. The concept of good faith (*Treu und Glauben*) is expressed in sections 157 and 242 of the German Civil Code, for the purposes of the dissertation the focus will be on section 242.

(iii) Section 242

The interpretation of a contract under German law in terms of *Treu und Glauben* is enshrined in section 242 of the German Civil Code, which provides that:

> 'The debtor is bound to effect performance according to the requirements of good faith (*Treu und Glauben*), giving consideration to common practice (*Verskehrssitte*).'

According to Kornet, section 242 is to be considered as a 'general clause' in the sense that it formulates a general legal principle, which 'directs the court to determine whether the manner and the nature of performance of the contractual obligations are in accordance with good faith.'[228] *Treu und Glauben* is an open-ended norm without substantative content it is therefore argued not to be capable of direct application to a particular set of facts.[229] This observation is

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[224] Kornet op cit note 217 at 113.
[225] Ibid at 114.
[226] Ibid.
[227] Ibid.
[228] Ibid at 111.
[229] Ibid at 113.

similar to that of scholars who regard the good faith concept as being elusive.[230] Since neither the conditions of application, nor the legal consequences of application of good faith are provided for in section 242, the task of creating a suitable solution is left to the judges.[231] Arguably if a similar omission on the application of good faith was to exist in a provision of an international trade instrument, it would defeat the purpose of uniformity of the good faith concept.

It can be gathered from the wording of section 242 that common practices (*Verskehrssitte*) have a significant role to play in determining the requirements of good faith. It is said that *Verskehrssitte* refer to:

'…the common practices or objective values within a particular society or groups within a society'[232]

Therefore to establish the existence of a common practice demands an establishment of 'an actual practice', based on the assumption that in a large number of cases parties act in the same manner.[233] In other words, a mere conviction that an actual practice exists is not enough, there must be evidence of an actual practice.[234]

Furthermore it is argued that common practices are not legal norms and can thus not be regarded as equivalent to good faith (*Treu und Glauben*).[235] Instead it is to be regarded as a '*Hilfsinstrument bei der normativen Wertung*' of good faith, meaning that common practice must be regarded as an aid instruments to judging or evaluation whether the requirements of good faith had been fulfilled by the debtor.[236] The good faith concept and common practice are connected through the formulation of *'mit Rücksicht auf'* which indicates:

> 'On the one hand that common practice is subsidiary to good faith and must therefore be substantively compatible with it…On the other hand, it indicates that common practice does contribute to the further specification (*Präzisierung*) of good faith.'

Therefore good faith will prevail if a common practice contradicts the requirements of good faith.[237] Additionally it argued that common practice should be 'regarded as a relevant factor for the concretization of good faith.'[238]

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[230] Ibid at 113.
[231] Ibid.
[232] Ibid at 114.
[233] Ibid.
[234] Ibid.
[235] Ibid at 115.
[236] Ibid.
[237] Ibid.

Given the fact that good faith (*Treu und Glauben*) is an 'open-ended norm lacking substantive content', German scholars have identified functions in order to give it structure and content.[239] There is, however, no uniform theory, but it is possible to differentiate between four functions of good faith.[240] Kornet argues that the first function of good faith is that the concept is used to regulate or concretize the manner of performance.[241] To illustrate this function she notes that:

> 'For example, section 242 is used to further concretize the specific provisions on the performance of the contract, such as section 271 concerning the place of performance.'[242]

Secondly, according to Zimmermann and Whittaker it is generally recognized that section 242 operates *supplendi causa* and specifies the way in which contractual performance has to be rendered thereby giving rise to 'a host of ancillary or supplementary duties' that may arise under the contract.[243] It is argued that such duties include amongst others the 'duties of information, documentation, co-operation, protection and disclosure.'[244] Furthermore it is argued that these duties of section 242 can also apply:

'…in the pre-contractual situation (*culpa in contrahendo*) and they may extend after the contract has been performed (*culpa post contractum finitum*).'[245]

Thirdly, section 242 serves to 'limit the exercise of contractual rights.'[246] Finally, and perhaps the most 'problematic function' is that section 242 has been used to 'interfere in contractual relations in order to avoid grave injustice.'[247]

It is argued from the nature of these functions that section 242 has grown beyond its literal meaning.[248] This is similar to the CISG where the application of the good faith concept in article 7 had gone beyond its intended purpose of merely being a tool of interpretation.[249] However, section 242 of the German Civil Code is said to provide the courts:

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[238] Ibid.
[239] Ibid.
[240] Ibid at 116.
[241] Ibid.
[242] Ibid.
[243] Zimmermann & Whittaker op cit note 21 at 24.
[244] Nystén-Haarala Soili 'Flexibility in Contracting' available at *https://www.ulapland.fi/loader.aspx?id=3b5ebc2d-34df-44c3-aba5-bf679e23847d*, accessed on 14 October 2015.
[245] Ibid at 170.
[246] Zimmermann & Whittaker op cit note 21 at 24.
[247] Ibid.
[248] Kornet op cit note 217 at 117.
[249] Ibid.

> '…with a large amount of judicial freedom and necessary discretion to specify, supplement and modify the law, i.e. develop the law in accordance with the perceived needs of their time'[250]

This broad nature of good faith in the German Civil Code has led some scholars to advocate 'abandonment of most concrete legal provisions in favour of section 242.' It is argued that such scholars have already succeeded:

> '…one can find a court decision or a scholarly theory applying the provision to almost every situation governed by the German Civil Code, and in addition very often overriding the text and the meaning of special provisions.'[251]

Furthermore, Schlechtriem notes that 'it seems as if the ironic remark often made with respect to Roman Law, as well as to the case law of the Anglo-Saxon countries, holds true to the consequences of the principle of *Treu und Glauben* under German law as well',[252] namely that:

> '…you can find a source (be it a court decision or a scholarly theory) for every solution imaginable or wanted, 242 BGB [Good Faith] serving as the legal anchor to even the wildest propositions and results.'[253]

Perhaps this standard of broadness in the German Civil Code was the pursued objective when drafting article 7 (1) of the CISG however the inclusion of good faith in article 7 (1) as a broad requirement was rejected during the drafting of the CISG.[254] There was perhaps a shared opinion that allowing a broad application of article 7 (1) of the CISG may undermine the application of the CISG, some authors have also argued that the continued criticism which intends to broaden the effect of good faith in the CISG will eventually lead to the to the recognition of a general obligation on the parties to behave accordingly.[255]

The process of identifying the functions of good faith in the German Civil Code has had criticism largely because of the elusive nature of the concept.[256] Therefore Schmidt argues that although the identified functions of section 242 represent an analysis of the application of section 242 they however 'do not provide a normative description of the content of section 242' and

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[250] Kornet op cit note 217 at 117.
[251] Peter Schlechtriem 'Good Faith in German Law and in International Uniform Laws' available at *http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem16.html*, accessed on 10 September 2015.
[252] Ibid at 8.
[253] Ibid at 7.
[254] Nicole E. Feit (ed) *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006* (2007) 158.
[255] Ibid.
[256] Kornet op cit note 217 at 117.

should therefore be abandoned.[257] Similarly the identification of the functions of good faith in international trade instruments could yield different outcomes in each instrument and thus disturb the attempts of having uniformity in the interpretation and application of the concept in international commercial transactions. Some scholars argue that the identification of functions can be useful in enabling the predictability of future judgments based on good faith (*Treu und Glauben*) even though the functions are 'not always capable of clear delineation.'[258]

(b) Dutch legal system

(i) Redelijkheid en Billijkheid

In the Dutch Civil Code, two sub-terms are used, just as in the German Civil Code, to refer to good faith (*geode trouw*). They are *Redelijkheid en Billijkheid* that literally mean 'reasonableness and fairness.'[259] Kornet argues that the distinction between the two can be determined by their individual definitions, that is, 'reasonableness' 'engages the head and refers to reason,' and 'fairness' 'engages the heart and refers to emotion.'[260] However, they are according to legislator to be regarded 'in combination as interconnected,' and neither is to be considered in isolation.[261] Therefore 'good faith,' in the sense of reasonableness and fairness, is generally referred to as 'hendiadys,' in Dutch case law.[262] According to the Oxford dictionary, the term hendiadys means:

> 'The expression of a single idea by two words connected with 'and', for example *nice and warm*, when one could be used to modify the other, as in *nicely warm*.' [263]

Furthermore, similar to *Treu und Glauben* in the German Civil Code, it argued that *Redelijkheid en Billijkheid* is a legal-ethical principle that 'addresses the subjective state of the parties,' such a state is said to include further vague values such as decency, honesty and loyalty.[264]

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[257] Ibid.
[258] Ibid.
[259] Ibid at 52.
[260] Ibid.
[261] Ibid.
[262] Ibid.
[263] Online Oxford Dictionaries 'Language matters' available at *http://www.oxforddictionaries.com/definition/english/hendiadys*, accessed on 8 October 2015.
[264] Kornet op cit note 217 at 53.

(ii) The application of Redelijkheid en Billijkheid

Hartkamp argues that *Redelijkheid en Billijkheid* has three functions in the Dutch Civil Code. First, it entails that all contracts must be 'interpreted according to good faith.[265] However the interpretation of contracts in the Netherlands has recently been dominated by the standard of interpretation established by the Dutch Supreme Court's judgment in *Ermes v Haviltex* 1981.[266] In that case, the Supreme Court rejected a 'purely literal approach to interpretation as well as an interpretation of the contract exclusively based on the subjective intentions of the parties.'[267] Furthermore, the Supreme Court held that the contract 'should rather be interpreted in the light of the parties' intentions and expectations in given circumstances.'[268] This standard of interpreting contracts in general was elaborated by the Supreme Court as follows:[269]

> 'How a written contract regulates the relationship between the parties and whether that contract leaves a gap that must be supplemented, cannot be determined on the basis of a purely literal interpretation of the provisions of a contract. To answer that question, it is necessary to have regard to the meaning that the respective parties in the given circumstances could have reasonably attached to these provisions and to take that which in that respect they could reasonably have expected from each other.'[270]

It is argued that the concept of good faith is already incorporated in the *Haviltex* standards.[271] Some scholars are therefore of the opinion that it is not necessary to call on good faith directly in the context of contract interpretation and application in the Netherlands.[272]

Secondly, *Redelijkheid en Billijkheid* has a supplementary function although this has been given the least amount of attention by Dutch contract law scholars.[273] Three common approaches to analyzing the supplementary function of good faith in case law have been identified.[274] It is noted that the first approach to analyzing the supplementary function of good faith is to:

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[265] Arthur Hartkamp *Contract law in the Netherlands* 3 ed (2011) 49.
[266] Kornet op cit note 217 at 31.
[267] Ibid at 30.
[268] Ibid at 31.
[269] Ibid.
[270] Translation from Nicole Kornet Nicole *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives* (2006) 31.
[271] Ibid at 34.
[272] Ibid.
[273] Ibid at 58.
[274] Ibid.

'…create a catalogue of cases in which the contract has been supplemented with duties stemming from good faith.'[275]

A second approach involves:

'…an analysis of case law on the basis of the types of contracts to which supplementary obligations based on good faith is added.'[276]

A third approach is to:

'…consider the factors that the courts take into account in order to determine the duties that are supplemented to the contract.'[277]

Finally, the standard of *Redelijkheid en Billijkheid* has a restrictive effect as the rule to be observed by the parties 'will not be applicable as far as it, given the relevant circumstances, would be unacceptable to standards of reasonableness and fairness.'[278] It is said that the effect of this provision is that 'a contractual or additional statutory provision must be set aside if its applicability has the potential undesirable consequence for one of the contracting parties.'[279]

It is argued that where the courts have to apply an elusive, open-ended norm such as *Redelijkheid en Billijkheid*, they must find as many 'objective factors as possible to justify their decision.'[280] This is particular the case where the courts' discretion appears to be the greatest.[281] In such case, it is 'necessary to let objective norms, principles and legal convictions applicable in the courts legal community guide its decisions,' though the court 'is not a law unto itself' in such cases.[282]

Furthermore, it is said that the Dutch Civil Code lacks a provision such as a 'general character of Swiss Civil Code,' which provides that the provision of good faith is applicable to all *'Zivilrechtliche Verhältnisse'* this has limited the application of *Redelijkheid en Billijkheid* only to contracts, although the Dutch Civil Code practically works the same way.[283]

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[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] The Dutch civil code; 6:248 (2).
[279] Hartkamp op cit note 265 at 49.
[280] Kornet op cit note 217 at 53.
[281] Ibid.
[282] Ibid.
[283] Hartkamp op cit note 265 at 50.

(iii) Article 6:2

The Dutch legislature has incorporated the concept of good faith (*Redelijkheid en Billijkheid*) in articles 6:2 and 6:248 of the Dutch Civil Code where it is expressed 'in relation to the relationship between the creditor and debtor,' similar to section 242 of the German Civil Code;[284] article 6:2 (1) provides that both parties to an obligation must behave themselves in accordance with the standards of reasonableness and fairness in their dealings with each other.[285] Furthermore article 6:2 (2) states that a rule binding upon such parties by virtue of law, common practice or a juridical act does not apply as far as this would be unacceptable, in the circumstances, by standards of reasonableness and fairness.[286] In addition, article 6:248 repeats this provision in the context of contracts stating that the contractual agreement between the parties must not only have the legal effects which the parties have agreed upon, but also those which, to the nature of the agreement, arise from law, common practice or the standards of reasonableness and fairness.[287]

(c) The United States legal system

(i) The Uniform Commercial Code

The U.C.C is made up of 'a number of uniform Acts and federal statutes,' such as the above mentioned, which have been promulgated 'to harmonize the law of sales and other commercial transactions in all 50 states' and it is said to embody a 'major corpus of American commercial law.'[288] Therefore the primary focus of this part of the dissertation will be on the meaning and application of the good faith concept in the U.C.C in order to determine if there are provisions within the U.C.C that can be adopted by international trade instruments in an attempt to reach uniformity.

(ii) The application of good faith in the U.C.C

Professor Farnsworth notes that the U.C.C applies good faith in two fundamentally different senses; one group of the U.C.C sections involves what may be loosely described as 'good faith purchase', he explains that in these sections good faith is used 'to describe a state of

[284] Ibid at 51.
[285] Ibid.
[286] Ibid.
[287] The Dutch civil code; 6:248 (1).
[288] Henry Gabriel 'Revision of the Uniform Commercial Code in the United States and its Implications for Australia' (1998) 24 *MULR* 291 at 291.

mind,' in other words, a party is advantaged only if he acted with 'innocent ignorance or lack of notice'.[289] As an illustration to this point Professor Farnsworth points out two provisions of the U.C.C, firstly, in terms of section 3-205 and 3-302 whether the holder of a negotiable instrument is a holder in due course depends, under the U.C.C, on whether he purchased in good faith.[290] Furthermore, he notes that the U.C.C. also uses 'good faith', as did prior law, in the same sense in 'protecting other parties besides purchasers,'[291] for instance, section 7-404 provides that a bailee who in good faith has received goods and delivered or otherwise disposed of the goods according to the terms of a document of title and the U.C.C will not be liable for the goods, 'regardless of whether the person from which the bailee received the goods did not have authority to procure the document or to dispose of the goods, or the person to which the bailee delivered the goods did have authority to receive the goods.' Additionally, section 3-417 provides that a drawee bank that pays a holder on an altered check in good faith may recover the payment.[292]

In the second and smaller group of the U.C.C provisions, Farnsworth notes that good faith is used to:

> '…describe performance or enforcement rather than purchase in which case good faith has nothing to do with the state of mind rather the inquiry involves decency, fairness or reasonableness in performance and enforcement.'[293]

He argues that this sense of the term may be characterized as 'good faith performance' to distinguish it from 'good faith in purchase'.[294]

What stands out from the above illustrations by Professor Farnsworth is that good faith plays a more intense role in the U.C.C than it does in the German and Dutch legal systems. It can perhaps be argued that this method of the concept in purchase and performance adopted by the U.C.C can be applied in all international trade instruments in order to ensure uniformity in the application of the concept in international commercial transactions however, the emulation of this in depth functions of good faith to international trade instruments could be a contentious exercise as some countries could prefer the concept to play an overall overriding role rather than

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[289] Farnsworth op cit note 92 at 667.
[290] Ibid at 668.
[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Ibid.

being imposed as a stringent obligation in the purchase and performance aspect of international commercial transactions, this point was expressed by some commentators in the discussion leading up to the inclusion of the good faith in article 7 (1) of the CISG.[295]

(iii) Article 1-203 of the U.C.C

The United States is said to be the only common law country to have included the concept of good faith in its statutory regime.[296] Article 1-203 of the U.C.C, as adopted in 1960, provides that:

> 'Every contract or duty within the Act imposes an obligation of good faith in its performance and enforcement'.

This provision was reinforced in section 205 of the Second Restatement of Contracts where a duty of good faith and fair dealing was also imposed on the parties in its performance and enforcement.[297] Section 205 provides that:

> 'Every contract imposes upon each party a duty of good faith in its performance and its obligation.'

Critics of article 1-203 argued that the provision was only applicable to areas covered by the U.C.C, which includes contracts of sale, documentary letter of credit and securities. Therefore it was not applicable to all contracts as a general rule.[298] Moreover, Burton proposes a revision of article 1-203 as the provision lumps the words 'performance' and 'enforcement' together as 'obligations'. He argues for the rephrasing of this provision as:

> 'Good faith in contract performance is an obligation, the breach of which is an ordinary breach of contract.'[299]

After this provision, the Code had been adopted by almost all States and governs a greater part of commercial transactions in the United States thereby making it 'a source of reference in determining the definition of and what is covered by good faith based on different articles.'[300]

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[295] Powers op cit note 1 at 338.
[296] Zeller op cit note 216 at 215.
[297] Ibid.
[298] Powers op cit note 1 at 338.
[299] Steven J. Burton 'Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View' (1994) 35 *WMLR* 1533 at 1538.
[300] Ibid.

(iv) Meaning of good faith in the U.C.C

The U.C.C differs from most domestic legal systems and international trade instruments as it includes several definitions of the good faith.[301] The definitions differ depending on the context in which they are used.[302]

Firstly, article 1-102 (20) provides that good faith entails:

'Honesty in fact and the observance of reasonable commercial standards of fair dealing.'

This definition is said to apply to the whole of the U.C.C, except Section 5 regarding letters of credit that defines good faith in article 5-107(7) as:

'Honesty in fact in the conduct or transaction concerned.'

Furthermore, 2-103 (1) (b) of the Index of Definitions, 2002, defines good faith in the case of merchants as:

'Honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.'

Fauvarque-Cosson points out that it is noteworthy that,[303] in addition to these definitions of good faith, article 1:304 provides that:

'The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable'.

Some scholars have argued that these definitions are broad.[304] Additionally there are few guidelines which can serve to give an interpretation to the concept.[305] This has led to confusion about the meaning of the term 'in actual practice and how it should be applied.'[306] In response to such confusion, Eisenberg came with a hypothesis of the meaning of good faith in the context of the U.C.C. As a starting point, he argues that the requirement of good faith under the U.C.C is, in effect 'a firm a far-reaching directive to the business community.'[307] Secondly, Eisenberg notes that the meaning of good faith demands that parties to a commercial transactions conduct their

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[301] Ibid.
[302] Ibid.
[303] Fauvarque-Cosson op cit note 1 at 159.
[304] Russell A. Eisenberg 'Good faith under the Uniform Commercial Code-A new look at an old problem' (1971) 54 *MLR* 1 at 1.
[305] Ibid.
[306] Ibid.
[307] Ibid.

business in a 'just and moral manner, within the framework of generally accepted prevailing business practices and aware of the happenings in the sectors of a particular transaction.'[308] Thirdly, such parties 'must beware', just as the buyer and seller in retail transactions.[309] Lastly, he expressed the importance of the courts applying a good faith obligation in deciding a case stating that:

> '…the day has passed when courts will close their eyes to the facts involved and enforce a contract or transaction because it was purportedly entered into between seemingly knowledgeable and experienced businessmen who considered themselves to be in an equal bargaining situation when they entered into the transaction or agreement.'[310]

Furthermore, Burton in his analysis of the definition of good faith in the U.C.C, points out that the main issue, in most discussions on the matter, involves the question of subjective and objective standards.[311] He argues that, in relation to article 1-102 (20), on the one hand, 'honesty' is 'supposed to be a subjective standard' while, on the other hand, 'reasonable commercial standards of fair dealing' is an 'objective standard,' although it might not be the same as 'standards of reasonableness, commercial reasonableness, or due care.'[312] Furthermore, he notes that, in relation to article 1:201 (20) 'honesty in fact' was intended to govern in the 'good faith purchaser' and 'holder in due course' contexts.[313] He argues that perhaps the drafters of the U.C.C thought contract performance and enforcement were in the contexts 'requiring a different meaning, allowed by the chapeau to section 1-201,'[314] which provides that:

> '(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of the Uniform Commercial Code that apply to particular articles or parts thereof, have the meanings stated.'

(d) English legal system

English courts have historically demonstrated hostility towards the concept of good faith in English contract law.[315] and the general view of commentators is that there is no legal concept of

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[308] Ibid at 2.
[309] Ibid.
[310] Ibid.
[311] Burton op cit note 299 at 1539.
[312] Ibid.
[313] Ibid.
[314] Ibid.
[315] Rosalee S Dorfman 'The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment' available at *http://criminology.leeds.ac.uk/files/2013/09/Fairness-English-Contract-Law_Dorfman.pdf*, accessed on 20 August 2015.

good faith in English law.[316] Perhaps the most cited opinions when opposing the application of good faith is in the case of *Interfoto*,[317] where Lord Bingham states that:

> 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing […] English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'[318]

This position is contrary to many civil law systems, in which there is often an overriding principle that the parties must act in good faith in the negotiation and performance of contractual obligations.[319]

(i) Watford v Miles

The different position taken by English courts on the obligation of contractual good faith and how it was approached in case law can be seen in *Watford v Miles*.[320] This case concerned the validity of lock-in and lock-out agreements, both of which were held to be unenforceable on the facts. The former is an agreement which obliges the defendant to negotiate exclusively with the plaintiff, while the latter is an agreement under which the defendant agrees not to continue negotiation with third parties but assumes no positive obligation to negotiate with the plaintiff.[321] The reason for the holding the lock-out agreement unenforceable was that it was not of a fixed duration; this was a defect that is curable by more careful drafting.[322] On the other hand, the lock-in agreement was held to be inherently unenforceable therefore it was not a matter of drafting deficiencies.[323] It was a question of law and the English law did not recognize the

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[316] Ibid.
[317] *Interfoto Picture Ltd v Stiletto Visual Programmes Ltd* [1989]1 QB 433.
[318] *Interfoto* supra note 317 at 439.
[319] Dorfman op cit note 315.
[320] *Watford v Miles* [1992] 2 AC 128.
[321] Angelo D.M Forte *Good faith in Contract and Property* (1999) 48.
[322] Ibid.
[323] Ibid at 49.

existence of an obligation to negotiate in good faith, this was said to be so for reasons of certainty and policy.[324] The policy reasons were clearly set out by Lord Ackner when he stated:

> 'The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversial position of the parties involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.'[325]

Furthermore, Lord Ackner concluded that:

> 'A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.'[326]

However the English Law position on good faith has changed somewhat since the *Watford* case as parties have increasingly included express good faith terms in their contracts. In the absence of such an agreed term, scholars have remained divided on whether a party must be contractually obligated to contract in good faith.[327] *Yhe Yam Seng* case is regarded as having set precedence on implied good faith in English contract law.[328]

(ii) The current English position on good faith

The position of good faith in English contract law is said to have taken 'a substantial leap forward' since the days when it was totally ignored.[329] The current status of the concept was summarized in the case of *Yam Seng* case[330] where it was stated that:

> 'Under English Law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for

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[324] Jack O'Connor 'The Enforceability of Agreements to Negotiate in Good Faith' available at *http://www.austlii.edu.au/au/journals/UTasLawRw/2010/8.html#Heading233*, accessed on 26 August 2015.
[325] *Watford* supra note 320 at 138.
[326] Ibid.
[327] Ibid.
[328] Dorfman op cit note 315.
[329] Ibid.
[330] *Yam Seng Pte Limited v International Trade Corporation Ltd* [2013] EWHC 111 [QB].

> the implications of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.'[331]

After the *Yam Seng* case, the English courts have reaffirmed that terms such as good faith will only be implied into complex commercial arrangements in specific and fairly limited circumstances and will not be done where such an implied term potentially contradicts an express term or is rendered unnecessary the express terms.[332] Bingham LJ argues that this cautious approach to the concept of good faith in English law can be attributed to three factors. First, the preferred method of English law is to 'proceed incrementally by fashioning particular solutions in response to problems rather than by enforcing broad overarching principles.'[333] This argument is also said to have contributed to the reason why English courts have not defined the concept of good faith and have rather preferred to work on a case-by-case basis.[334] Even though a definite meaning of good faith had not been reached, the English courts have nevertheless proclaimed what they perceive to be the principles included in the concept of good faith. This point was expressed in the *CPC Group* case,[335] when it was concluded that an obligation to act in 'utmost good faith' included the requirement to:

> '…adhere to the spirit of the contract…and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties.'[336]

It is argued that a further reason for the reluctance is that English law is said to embody an 'ethos of individualism', by which the parties are free to pursue their own self-interest both in negotiation and in performing contracts on the condition that they do not act in breach of a term of the contract.[337] The third reason given is the fear that 'recognising a general requirement of good faith in the performance of the contracts would create too much uncertainty.' This is based on a concern that the content of the obligation would be vague and subjective and therefore it is

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[331] *Yam* supra note 330 para 120-131.
[332] Mark Abell & Victoria Hobbs 'The duty of good faith in franchise agreements–A comparative study of the civil and common law approaches in the EU' available at *http://www.twobirds.com/~/media/PDFs/Brochures/Franchising/The%20duty%20of%20good%20faith%20in%20franchise%20agreements.PDF*, accessed on 20 August 2015.
[333] *Yam* supra note 258 para 123.
[334] Ibid.
[335] *CPC Group Ltd v Qatari Real Estate Investment Co* [2010] EWHC 1535 [Ch].
[336] *CPC* supra note 263 para 246.
[337] *Yam* supra note 258 para 123.

argued that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.[338]

(iii) England and the CISG

Lord Steyn argues that adopting an objective approach to contractual obligations has made England a somewhat 'infertile soil' for the development of a generalized contractual duty of good faith.[339] However Zeller argues that two developments may force this position to change: 'First, since the United Kingdom appear to be on the verge of ratifying the CISG, which has adopted the concept of good faith, although in an arguably deficient manner, may compel England to take a different approach since it is argued that the good faith concept as contained in article 7 (1) can be extended to the interpretation of domestic contracts. Secondly, the impact of the European Community Directives, which in part touch on the concept of good faith, is likely to force the English courts and lawyers to confront the meaning of good faith and thereby have an enthusiastic approach to its application.'[340]

This brief examination of national laws and its treatment of good faith demonstrate two things; firstly, there are contrasting opinions, even within one jurisdiction, on the definition of the concept thus scholars argue that it can be given meaning by identifying the principles on which it is based.[341] Secondly, each country applies the concept of good faith differently.[342]

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[338] Ibid.
[339] Zeller op cit note 216 at 215.
[340] Ibid at 217.
[341] Hesselink op cit note 75 at 471.
[342] Zeller op cit note 216 at 221.

CHAPTER 5 CONCLUSION

At the start of this dissertation the question was asked whether uniformity in the meaning and application of good faith in international commercial transactions can be achieved. This dissertation concludes that such uniformity is possible however certain obstacles have to be addressed that have prevented a uniform adoption of the concept in international trade to date.

Firstly one of the obstacles that prevent the attainment of such uniformity is that the meaning of good faith changes depending on the context in which it is used.[343] Arguably such changes on the basis of context may be unavoidable because of the elusive nature of good faith. However this dissertation argues that consistency in the meaning of the good faith in international trade instruments can nevertheless be achieved. This dissertation argues that such uniformity can be attained by finding a definition of good faith based on the fundamental principles it is based, such as fairness and honesty, instead of adopting strict and exclusive definitions in international trade instruments.

Secondly attaining uniformity in the application of good faith in national laws and international trade instruments is a similarly daunting task. This is largely because good faith is applied in different parts of commercial transactions thus it occupies different functions in contracting. For example most European civil codes apply pre-contractual good faith while others use the concept to validate the contract itself.[344] Similarly good faith application in international trade instruments has different dimensions ranging from having a role in interpretation regulating the contractual relationship of the parties. The attainment of uniformity in application of good faith in international trade instruments is possible. This dissertation argues such uniformity can be attained.

The third and perhaps the hardest challenge to attaining uniformity in the meaning and application of good faith in international trade instruments has to do with gap filling by courts and tribunals with reference to national laws. The practice of gap filling with reference to national laws has had a significant role in international trade.[345] The importance of gap filling with on the basis of good faith was noted by Pargendler stating that:

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[343] Volin op cit note 57 at 349.
[344] Martijn Hesselink 'The Concept of Good Faith' in *Towards a European civil code* 3 ed (2004) 471- 498.
[345] Pargendler op cit note 6 at 21.

> '…at the core of the gap-filling nature of the doctrine of good faith is the idea of preventing a party from taking advantage of gaps…In determining whether there is a gap, courts pay special attention to the characteristic of the deals in question and fill them accordingly.'[346]

Although the practice of gap filling on the basis of good faith has a seemingly important role in international commercial transaction transactions, this dissertation concludes that such practice defeats the goal of maintaining the 'international character' of trade instruments. Thus the solution to the problem should involve obviating the need for gap filling.

Gap filling can perhaps be obviated by drafting clear good faith provisions in trade instruments. This will arguably reduce the need for courts and tribunals to make reference to national laws and thereby increase the dependency on the good faith provisions of such instruments.

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[346] Ibid.

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